PETITIONER:
MOHANLAL GANGARAM GEHANI

Vs.

RESPONDENT:
STATE OF MAHARASTRA

DATE OF JUDGMENT17/02/1982

BENCH:
FAZALALI, SYED MURTAZA
BENCH:
FAZALALI, SYED MURTAZA
DESAI, D.A.
VARADARAJAN, A. (J)

CITATION:
1982 AIR 839 1982 SCR (3) 277
1982 SCC (1) 700 1982 SCALE (1)143
CITATOR INFO :
RF 1972 SC1817 (18)

ACT:
Evidence Act-Section 145-Scope of-Identification parade-Accused identified by witness for the first time in court-Evidence-Validity of.

HEADNOTE:
The prosecution case against the appellant was that on the night of occurrence between 11 and 11.30 the informer and two of his friends were standing on a road when suddenly the three accused emerged out of the car and the appellant assaulted and stabbed the injured person with a dagger. The prosecution alleged that there was enemity between the assailants and the injured person; that the informer lodged a F.I.R. at 00.50 hrs. and that the injured man was picked up by a Police Wireless Van and admitted in the hospital.

The trial court convicted the accused under section 326/34 I.P.C. and sentenced them variously.

The High Court acquitted two of the three accused. In regard to the appellant, disbelieving the evidence of the doctor on the ground that the name of the assailant was first written by her as "Tony" but later changed to read as "Tiny" and that secondly there was no particular column in the register where the name of the assailant could be written, the High Court altered the conviction to one under section 326 I.P.C. and sentenced him to rigorous imprisonment for three years.

On appeal to this Court it was contended on behalf of the appellant that (1) the F.I.R. was not lodged at 00.50 hrs. as claimed by the prosecution; (2) the injured did not know the appellant before the occurrence; (3) the version of the injured that the name of the assailant was disclosed to him by a friend of the informer should not be accepted and (4) the discrepancy in the name of the assailant recorded by the doctor was not such as to completely discredit her evidence.

Allowing the appeal,

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HELD: (a) The change of name "Tony" into "Tiny" in the hospital register might be due to mis-hearing of the name in

the first instance and correcting it later. Much could not be made of this circumstance. The doctor had initialled the alteration. The prosecution has not made any attempt to declare
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the doctor a hostile witness and to cross-examine her. Therefore the change in the name could be a bona fide mistake. That apart, the injured was fully conscious at the time he made the statement to the doctor. [282 A-C]

(b) The High Court was in error in stating that there was no particular column in the hospital register in which the name of the assailant could be mentioned. The entire part of the register where the statement had been recorded by the doctor is described as the "Registrar's note" which comprehends everything including the nature of injuries to the injured, any statement made by him or similar other matters. [281 E-F]

(c) There is no evidence on record to show that the doctor was in any way friendly with the appellant or inimical towards the injured man; she was an absolutely disinterested and independent witness. [281 G]

2 (a) The High Court had erred in holding that the doctor's evidence was inadmissible in that the provisions of section 145 of the Evidence Act had not been complied with. [282 F]

(b) Section 145 applies only to cases where the same person makes two contradictory statements either in different proceedings or in two different stages of a proceeding. If the maker of a statement is sought to be contradicted, his attention should be drawn to his previous statements under section 145, that is to say, where the statements made by a person or a witness is contradicted not by his own statement but by the statement of another prosecution witness the question of application of section 145 does not arise. [283 A-C]

(c) The doctor's statement was an admission of a prosecution witness. If it was inconsistent with the statement made by another prosecution witness there was no question of application of section 145 of the Evidence Act. [283 C]

In the instant case the statement of the injured to the doctor being first in point of time it must be preferred to any subsequent statement made by the injured.

There is much evidence to show that the injured did not know the appellant before the date of the incident. No test identification parade had been held. The appellant was shown by the police before he identified him. If the accused was not known to the injured and his friends before the incident and was identified for the first time in the court, this evidence has no value and cannot be relied upon in the absence of a test identification parade. [285 E,C,F]

V.C. Shukla v. State (Delhi Administration), [1980] 3 S.C.R. 500 and Sahdeo Gosain & Anr. v. The King Emperor [1944] FCR 223, referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 4 of 1976.
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Appeal by special leave from the judgment and order dated the 29th August 1975/1st Sept., 1975 of the Bombay High Court in Criminal Appeal No. 1639 of 1972.

Ram Jethmalani, Mrs. S. Bhandare, A.N. Karkhanis, T.

Sridharan and C.K. Sucharita for the Appellant.

J.L. Nain, and H.R. Khanna and M. N. Shroff for the Respondent.

The Judgment of the Court was delivered by

FAZAL ALI, J. This appeal by special leave is directed against a judgment dated 29th August 1975/1st September 1975, of the Bombay High Court convicting the appellant, Mohanlal Gangaram Gehani (hereinafter referred to as A-1) under section 326, I.P.C. and sentencing him to rigorous imprisonment for three years. He was also convicted under s. 323 read with s. 34 I.P.C. but no separate sentence was awarded.

The trial court had convicted A-1 under s. 326/34 I.P.C. which was altered by the High Court to one under s. 326 simpliciter. The details of the prosecution case are to be found in the judgment of the High Court and it is not necessary for us to repeat the same. We shall, however, give a brief resume of the important facts which are germane for deciding the short points raised by Mr. Jethmalani, counsel for the appellant.

The occurrence out of which the present appeal arises appears to have taken place on April 2, 1972 at about 11-11.30 p.m. According to the prosecution while Ishrat Malik Faqih (hereinafter referred to as 'Ishrat') was returning from a movie in Paradise Cinema, situated at Lady Jamashedji Road, Mahim at about 12 15 a.m. he met Salim, a friend of his, alongwith Shaikh Abdul Kalim alias Pappu (P.W. 4). He also saw another person standing with Salim and Pappu. All of them started talking to one another when suddenly they saw a black Fiat car coming from Lady Jamashedji Road and taking a turn to Chotani Road. The car stopped near the place where the aforesaid persons were talking and A-1, A-2 (Shashi) and A-3 (Kumar) emerged from the car. According to the informant, Ishrat, all the three accused were known to him before. These persons were dead drunk and asked Ishrat and party as to who amongst them was their leader. Some sort of
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an altercation took place in the course of which A-2 caught hold of the shirt of Shanker Shetty and assaulted him with fists. He was joined by A-3 and the altercation culminated in a murderous assault said to have been made by A-1 who took out a dagger and stabbed Shetty on the right side of the stomach below the chest. Shetty fell down. Thereafter A-1 ran back to his car and sped away leaving behind A-3 who could not get into the car. Ishrat immediately proceeded to the Mahim police station and lodged an F.I.R. with Sub-Inspector Sawant (P.W. 7) at 00.50 hrs. On April 3, 1972. According to the prosecution, the informant had rushed to the police station and lodged the F.I.R. within an hour of the occurrence.

Subsequently, it appears that a wireless police van which passed through the place of occurrence having found Shetty lying injured picked him up and removed him to K.E.M. Hospital. Dr. Heena (P.W. 11) admitted Shetty and made a note of the injuries received by him in the notesheet of the hospital register and also mentioned the fact that the injured had named his assailant as one Tiny. It was further alleged by the prosecution that Sawant after recording the F.I.R. rushed to the hospital and contacted Shetty and recorded his statement at 1.45 a.m.

After the usual investigation, chargesheet was submitted against A-1 to A-3 who were ultimately tried and convicted for an offence under s. 326 read with s. 34 I.P.C. and A-1 was sentenced as mentioned hereinbefore. A-2 and A-3

each was sentenced to suffer rigorous imprisonment for two years. A-1 pleaded innocence and his defence was that he was falsely implicated due to enmity because Ishrat and his friends were carrying on Matka business and the appellant being an informer of the Customs Department had made certain reports against the prosecution witnesses particularly Ishrat who was a smuggler. We need not refer to the defence of A-2 or A-3 as they have been acquitted by the High Court.

The appellant raised several points before the High Court which after hearing the parties confirmed his conviction but reduced his sentence to rigorous imprisonment for three years.

In support of the appeal Mr. Jethmalani has argued three important points relating to certain circumstances which completely demolish the entire prosecution case against the appellant.

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In the first place, it was argued that the F.I.R. was not at all lodged at 00.50 hrs. as alleged by the prosecution but much later. Secondly, Shetty did not know the appellant before the occurrence and thirdly, Mr. Jethmalani argued, that his version that the name of the appellant was disclosed to him by Salim should not be accepted.

Another important circumstance to which our attention was drawn and which has greatly impressed us is that the hospital register (Ext. 22) shows that when Shetty was taken to the hospital and produced before Dr. Heena (P.W. 11) he gave the name of his assailant as one Tiny or Tony. The evidence further shows that Tiny or Tony was undoubtedly a known person who was living in a locality near the place of occurrence and was not a fictitious red herring as the prosecution would have us believe. According to Ext. 22 Shetty made a statement to Dr. Heena at 1. 15 a.m. on April 3, 1972. Dr. Heena, who appeared as P.W. 11, fully supported the contents of Ext. 22.

It is manifest that once the statement of P.W. 11 is accepted then the entire prosecution case against the appellant falls. The High Court realising the importance of this document and the evidence of P.W. 11 seems to have explained it away on three main grounds. In the first place, the High Court laid great emphasis on the fact that where Dr. Heena had mentioned the name of Tiny, there was no particular column where the name of assailant could be given. We have examined the original document ourselves and we find that the entire part of the register where the statement has been recorded by P.W. 11 is described as Registrar's note which comprehends everything including the nature of injuries of the injured, any statement made by him or similar other matters. We are, therefore, unable to agree with the High Court that there was no particular column under which the name of the assailant could be mentioned. Moreover, there is absolutely no evidence on the record to show that P.W. 11 was in any way friendly with the appellant or had any animus against Shetty which might impel her to make false entries in order to oblige the appellant. P.W. 11 was an absolutely disinterested and independent witness. After going through her evidence we find no reason why her evidence should not be accepted in toto.

The High Court further observed that from the hospital register it appears that the word 'Tony' was first written, then crossed

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and changed into 'Tiny'. This may be a mistake in the pronunciation of the name and much significance cannot be attached to this circumstance because P.W. 11 had initialled

the change and it is not a case of forgery at all. Moreover, P.W. 11 was examined as a prosecution witness and if the learned prosecutor had thought that she (P.W. 11) had given false evidence to help the appellant, he could have declared her hostile and sought the permission of the court to cross-examine her but no such course was adopted. Hence, the mere change of the word 'Tony' to Tiny' can be explained on the basis of a bona fide mistake. There is no erasure. Both names are decipherable. What may have happened was that the injured may have pronounced Tiny in such a way that P.W. 11 thought it was Tony but on further clarification the injured must have said that it was Tiny.

P.W. 11 in her evidence has clearly stated that she had examined the patient and had given the history of the assault with knife by a person called Tiny and that the patient was fully conscious. There is nothing in her evidence to show that her statement could be untrue.

The High Court then sought to exclude the evidence of P.W. 11 as being inadmissible as the provisions of s. 145 of the Evidence Act were not complied with. It was suggested that Shetty had mentioned the name of the appellant in his statement in court but the statement of P. W. 11 shows that he had named Tiny as his assailant and, therefore, Dr. Heena (P.W. 11) should have been cross examined on this point to explain the contradiction. With great respect, the High Court has erred on this point and has misconstrued the provisions of s. 145 of the Evidence Act which may be extracted thus:

> "145. Cross-examination as to previous statements in writing.
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> A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved, but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

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It is obvious from a perusal of s. 145 that it applies only to cases where the same person makes two contradictory statements either in different proceedings or in two different stages of a proceeding. If the maker of a statement is sought to be contradicted, his attention should be drawn to his previous statement under s. 145. In other words, where the statement made by a person or witness is contradicted not by his own statement but by the statement of another prosecution witness, the question of the application of s. 145 does not arise. To illustrate, we might give an instance-suppose A, a prosecution witness, makes a particular statement regarding the part played by an accused but another witness B makes a statement which is inconsistent with the statement made by A, in such a case s. 145 of the Evidence Act is not at all attracted. Indeed, if the interpretation placed by the High Court is accepted, then it will be extremely difficult for an accused or a party to rely on the inter-se contradiction of various witnesses and every time when the contradiction is made, the previous witness would have to be recalled for the purpose of contradiction. This was neither the purport nor the object of s. 145 of the Evidence Act.

For instance, in the instant case, if P.W. 11 had been examined under s. 164 of Code of Criminal Procedure or before a committing court and made a particular statement which was contradictory to a statement made in the Sessions

Court, then s. 145 would have applied if the accused wanted to rely on the contradiction. Such, however, is not the position because the evidence of P.W. 11 is not only consistent throughout but the earlier statement recorded by her can be taken to corroborate her. There was no question of contradicting the statement of P.W. 11 by her previous or subsequent statement. On the other hand, Dr. Heena was a prosecution witness whose statement that Shetty had named Tiny on the earliest occasion, was an admission by a prosecution witness which threw considerable doubt on the complicity of the appellant in the occurrence. If Shetty stated in his evidence that he named A-1 (Mohanlal) then that would be a statement which was contradictory to that of P. W. 11 and the question will be which of the two statements should be preferred. If Dr. Heena had made two inconsistent statements then only s. 145 would have applied.
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In Bishwanath Prasad & Ors. v. Dwarka Prasad and Ors.(1) while dwelling upon a distinction between an admission and a statement to which s. 145 would apply, this Court observed as follows:

> "In the former case an admission by a party is substantive evidence if it fulfills the requirements of s. 21 of the Evidence Act; in the latter case a prior statement is used to discredit the credibility of the witness and does not become substantive evidence. In the former there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence proprio vigor: in the latter case the Court cannot be invited to disbelieve a witness on the strength of a prior contradictory statement unless it has been put to him, as required by s. 145 of the Evidence Act."

The statement made by P.W. 11 was, therefore, an admission of a prosecution witness and if it was inconsistent with the statement made by another prosecution witness namely Shetty, there was no question of the application of s. 145 of the Evidence Act which did not apply to such a case in terms.

Thus, the reason given by the High Court for distrusting the evidence of Dr. Heena is wholly unsustainable. Moreover, the statement of the injured to Dr. Heena being the first statement in point of time must be preferred to any subsequent statement that Shetty may have made. In fact, the admitted position is that Shetty did not know the appellant before the occurrence nor did he know his name which was disclosed to him by one Salim. Therefore, Salim who is now dead, being the source of information of Shetty would be of doubtful admissibility as it is not covered by s. 32 of the Evidence Act. And, once we believe the evidence of P.W. 11, as we must, then the entire bottom out of the prosecution case is knocked out.

Apart from this, there is another circumstance which renders the testimony of Shetty (P.W. 5) valueless. He admits in para 10 of his evidence (page 35 of the paperbook) that he had not seen the accused before the date of the incident, that he did not know him at all, and that he came to know the name of the accused on the
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date of the incident and that it was Salim who had given him the name of the accused while he was being taken to the hospital. The fact that Salim disclosed the name of the appellant to Shetty is falsified by the fact that he did not name the appellant to Dr. Heena when he reached the hospital but named one Tiny. It is also relevant to note that Tiny

Advani is not an unknown figure but is a living person as would appear from the evidence of P.W. 3, Shaikh, where he says that he knew Tiny Advani who is also known to Ishrat, Salim and Pappu and they are on greeting terms.

Another important circumstance which discredits the testimony of P.W. 5 (Shetty) is that he admits that although he did not know the accused from before the occurrence yet the accused was shown to him by the police at the police station. The relevant statement of P.W. 5 may be extracted thus:

> "I had seen the accused before coming to the Court and after the incident, I had seen the accused ten days after I was discharged from the hospital. I was shown these accused by the Police at the Police Station."

Thus, as Shetty did not know the appellant before the occurrence and no Test Identification parade was held to test his power of identification and he was also shown by the police before he identified the appellant in court, his evidence becomes absolutely valueless on the question of identification. On this ground alone, the appellant is entitled to be acquitted. It is rather surprising that this important circumstance escaped the attention of the High Court while it laid very great stress in criticising the evidence of Dr. Heena when her evidence was true and straight forward.

For these reasons, therefore, we are unable to place any reliance on the evidence of Shetty so far as the identification of the appellant is concerned.

The other witness who knew the accused is P.W. 1 (Ishrat) who is said to have lodged the F.I.R. at Mahim police station at 12.50 a.m. on 3.4.1972. There is clear intrinsic evidence in the case to show that the FIR was ante-timed and could not have been lodged at 12.50 a.m. P.W. 7, Sawant had clearly admitted in his evidence at page 41 of the Paperbook that the station diary entry which has to contain the contents of the F.I.R. does mention that Ishrat had

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visited the Police station and lodged the complaint. The witness further admits that the station diary entry does not also mention anywhere that he (P.W. 7) had left the police station for K.E.M. hospital accompanied by P.W. 1, Ishrat. He also admits that he knew the accused before the incident.

The witness further admits that although he had come to know the name of the assailant at 12.50 a.m. yet he did not take any step to arrest or cause the arrest of any one of the accused. He has not given any explanation for this unusual conduct. It is extremely doubtful if P.W. 1 had actually named the appellant, inspector Sawant would not have arrested him immediately after the F.I.R. was lodged or, at any rate, after he returned from the Hospital. The evidence, however, shows that A-1 was arrested on 5.4.72, that is to say, two days after the occurrence. No explanation for this unusual phenomenon has been given by the prosecution.

For these reasons, therefore, the statement of P.W. 1 that he lodged the F.I.R. at 12.50 a.m. on 3.4.72 and disclosed the name of the appellant becomes absolutely doubtful. If we reject this part of the evidence of P.W. 1, then his evidence on the question of complicity of the appellant in the crime also becomes extremely doubtful.

The only other evidence against the appellant is that of P.Ws. 3 and 4. So far as P.W. 3 is concerned his evidence also suffers from the same infirmity as that of Shetty. P.W. 3 (Shaikh) admits at page 22 of the Paperbook that he had

not seen the accused or any of the three accused before the date of the incident and that he had seen all the three for the first time at the time of the incident. He further admits that the names of the accused were given to him by the police. In these circumstances, therefore, if the appellant was not known to him before the incident and was identified for the first time in the court, in the absence of a test identification parade the evidence of P.W. 3 was valueless and could not be relied upon as held by this court in V.C. Shukla v. State (Delhi Administration)(1) Where this Court made the following observations:

> "Moreover, the identification of Tripathi by the witness for the first time in the court without being tested by a prior test identification parade was valueless."

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Same view was taken in a Federal Court decision in Sahdeo Gosain & Anr. v. The King Emperor.(1)

This, therefore, disposes of the evidence of P.W. 3. As regards the evidence of P.W. 4, the High Court itself found at page 129 of the paperbook that the learned Additional Sessions Judge had disbelieved P.W. 4, Shaikh alias Pappu. Therefore, the evidence of P.W. 4 also goes out of consideration.

The position, therefore, is that there is absolutely no legal evidence on the basis of which the appellant could be convicted.

For the reasons given above, we are satisfied that the prosecution has not been able to prove its case against the appellant beyond reasonable doubt. The appeal is accordingly allowed and the appellant is acquitted of the charges framed against him. He will now be discharged from his bailbonds and need not surrender.

P.B.R. Appeal allowed.

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